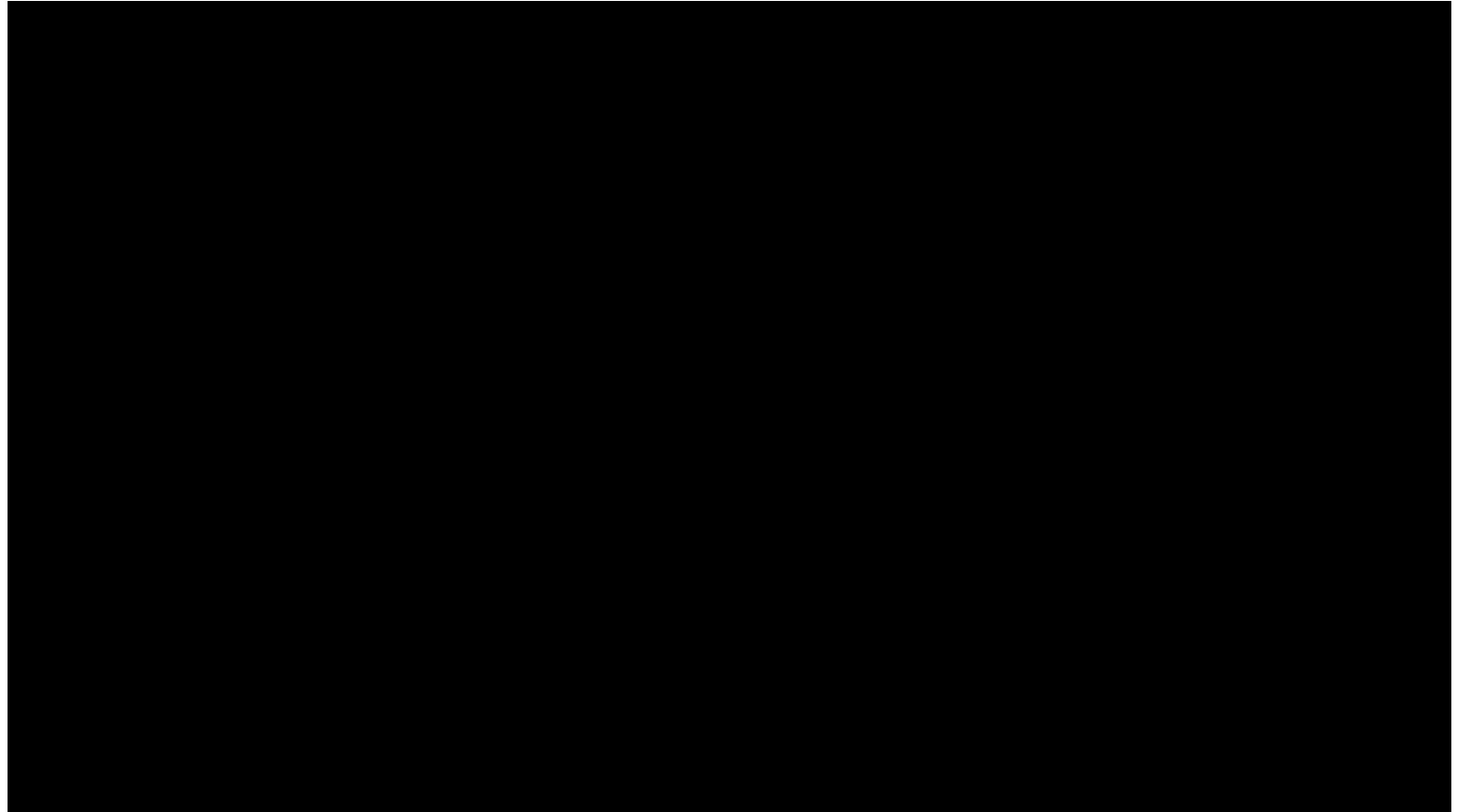


FREEDOM OF SPEECH AND THE PUBLIC EMPLOYEE

UAC Management Conference 2017



It's a free country . . .



A Very Short History . . .



“A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”

McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892).

A Change . . .

The First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people.”

Roth v. United States, 354 U.S. 476, 478 (1957)

Speech on public issues occupies the “highest rung of the hierarchy of First Amendment values,” and is entitled to special protection.

Connick v. Myers, 461 U.S. 138, 145 (1983) quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).



The Court Sheds New Light . . .

- *Pickering v. Board of Education* (1968), *Connick v. Myers* (1983), and *Garcetti v. Ceballos* (2006) together articulate a test for determining whether a government employer may limit the speech of its employees



Speech Pursuant to Official Duties . . .

- Speech is made pursuant to official duties if it is generally consistent with the type of activities the employee was paid to do.
 - Ultimate question is whether the employee speaks as a citizen or as a government employee acting in his or her official capacity



Pursuant to Official Duties? . . .

- Group of teachers met off campus and after hours to discuss concerns and grievances – joined by parents and other members of the public.
 - Dozens of topics were discussed at various meeting.
- School officials directed the teachers not to discuss school matters outside school.



Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192 (10th Cir. 2007)

- **Not protected by First Amendment** – Nearly all matters discussed were pursuant to their official duties as teachers – student discipline, curriculum, effective pedagogy, funds for equipment.
- **Matters protected under First Amendment:** Criticism of school board, salaries, communication with school officials, upcoming Board elections, restrictions of speech by school officials, etc.



Pursuant to Official Duties? . . .

- Police department policy states that employees shall not publically display political signs at their residences.
- Officers' wives, not officers, display political signs on jointly owned property.
- Officers argue that government right to control political speech by employees cannot extend to political signs displayed by spouses.



Horstkoetter v. Department of Public Safety, 159 F.3d 1265 (10th Cir. 1998)



Department's policy serves 3 purposes:

- Assure employees that they cannot be required to display political signs
- Promote efficiency and harmony in department
- Proclaim that that police protection will be available to public without regard to political affiliations.

Department may **not** discipline officer if the political speech was that of the officer's spouse.

Public Concern . . .



- To be protected, the public employee's speech must be on a matter of **public concern**.
 - A matter of public concern is a matter of political, social, or other concern to the community.

Finding Matters of Public Concern . . .

- No defined standard – fact intensive
- Courts look to the “content, form, and context of a given statement.”
- Was the purpose of the speech to raise public concern or to further private interest?



Is it a matter of public concern? . . .



- Assistant County Attorney is informed that she will be transferred to another unit – she opposes transfer.
- She then prepares and distributes a questionnaire concerning the transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.

Supreme Court says, “Maybe” . . .

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case.



- The First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs.
- Only the question which inquired about whether employees felt pressure to work on political campaigns was matter of public concern.

Is It a Matter of Public Concern? . . .

- For 23 years, high school football coach had a tradition of engaging in team prayer in the locker-room prior to every game and at an invitation-only pre-game team meal.
- School gives the coach guidelines that require that any prayer be student initiated and the coach not participate.
- When students vote to continue the tradition, coach participates only by silently bowing his head or taking a knee.



Borden v. School Dist. of Tp. East Brunswick, 523 F.3d 153 (3rd Cir. 2008)

- **Coach's silent actions were not a matter of public concern**
- Content of the coach's participation was secular in nature, since his gestures were intended to promote solidarity, help form the team into a cohesive family unit, and show respect for the players' prayer.
- Not performed as part of a broad social or policy statement.
- His silent acts were not done in a public forum.



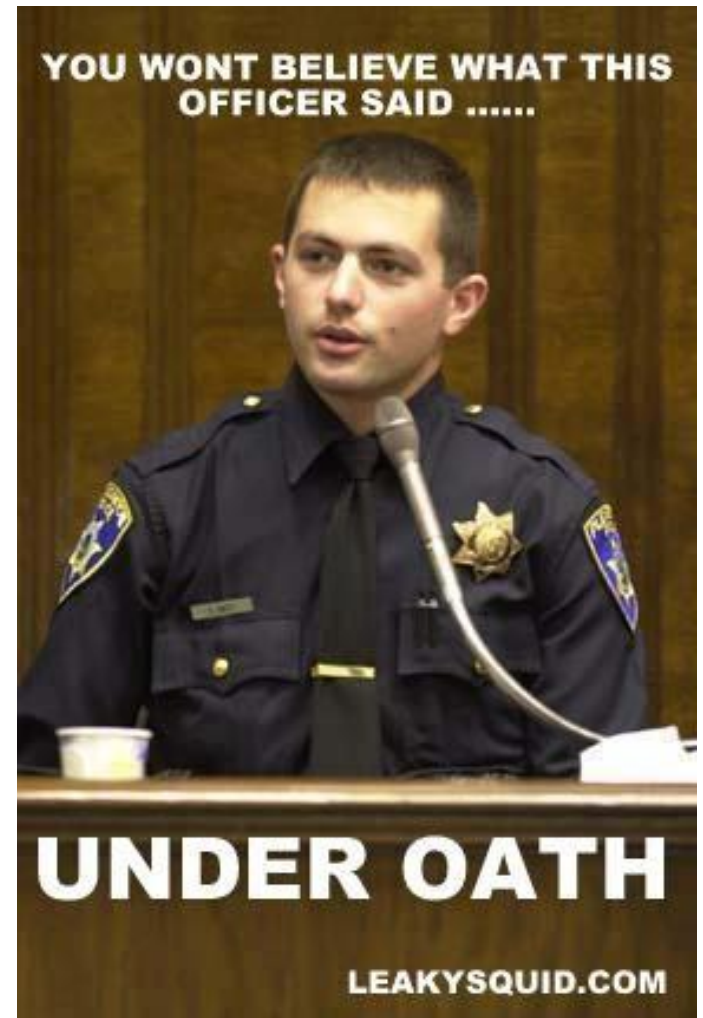
Is It A Matter of Public Concern? . . .



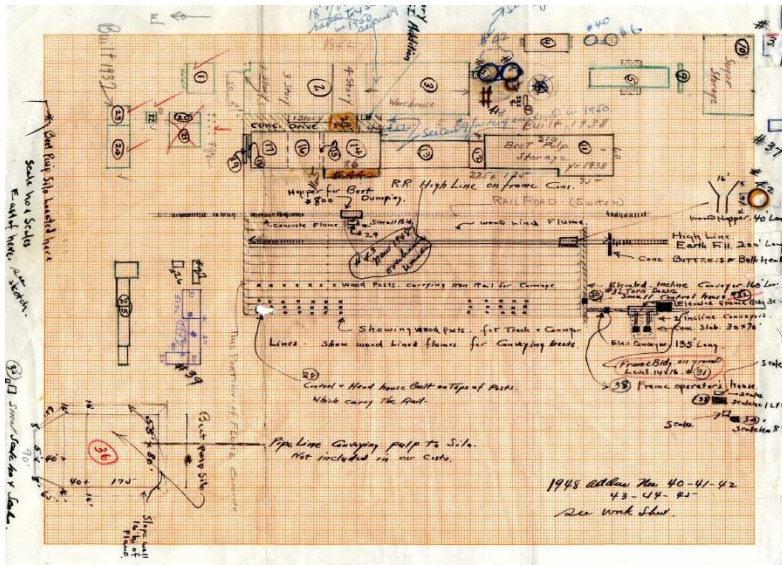
- Police Chief took money from petty cash to buy a laptop – violated policy.
- Citizen raises concern, sends letter to city manager – police chief brings defamation suit against citizen.
- City manager hears police chief give false testimony at defamation hearing.

Deutsch v. Jordan, 618 F.3d 1093 (10th Cir. 2010)

- Police Chief's testimony was a matter of public concern.
- Court may consider the motive of the speaker – Police chief was responding to a charge of public corruption



Is It a Matter of Public Concern?



- County Assessor decides to retire – promises an employee a promotion if employee will support a specific candidate.
- Employee agrees but later changes her mind – outlines the basis of her change in a memo.
- County Assessor asks her not to show her memo to anyone outside the office.
- Employee shows the memo to HR.

Sparr v. Ward, 306 F.3d 589 (8th Cir. 2002)

- Employee's memo was **not** a matter of public concern.
 - Employee's memo was only addressed to County Assessor and candidate – mostly personal comments, expressions of gratitude and praise.
 - Record showed the employee was not speaking as a private citizen.

The image shows a sample memo form enclosed in a dotted border. At the top center, the word "Memo" is written in a large, cursive font and underlined. Below it, the form is divided into two columns. The left column contains the labels "TO:", "FROM:", "DATE:", and "SUBJECT:". The right column contains the corresponding fields: "Employee's Name", "Your Name", "Today's Date", and "One or Two Words". Handwritten entries are present: "Employee's Name" is filled in, "Your Name" is filled with "R.H.", and "Today's Date" is filled with a date. There are two callout boxes with arrows pointing to the form. One box, labeled "Align info. using the TAB key!", points to the "TO:" label. The other box, labeled "Your Initials go here", points to the "Your Name" field. Below the form fields, there is a paragraph of text: "Write a message to a fellow employee explaining a new policy or procedure that you want carried out in your company. This message must be at least 4 sentences long."

Align info. using the TAB key!

Memo

TO: Employee's Name

FROM: Your Name R.H.

DATE: Today's Date

SUBJECT: One or Two Words

Your Initials go here

Write a message to a fellow employee explaining a new policy or procedure that you want carried out in your company. This message must be at least 4 sentences long.

Is It a Matter of Public Concern? . . .

- Cardiac nurse employed by public hospital is pulled over for speeding – conversation with police officer is “less than cordial.”
- After receiving a ticket, she tells the officer she hopes she never has him as a patient.
- Police officer asks if she is threatening him and states he will inform her supervisor.
- Nurse is terminated for threatening a police officer.



Leverington v. City of Colorado Springs, 643 F.3d 719 (10th Cir. 2011)



- Nurse's statement was **not** a matter of public concern.
- It is not enough that a statement may be of public interest, rather it is "what is actually said on the topic" that is the crux of the public concern determination.
 - Court focuses on the motivation of the speaker

Efficient Workplace . . .

- Seeks to balance the interests of the employee as a citizen in commenting upon matters of public concern against the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees.
 - *Pickering/Garcetti* test



Efficient Workplace factor . . .



- Did the employee direct the statement toward any person with whom the employee would normally be in contact in the course of the employee's daily work?

Disruptive to an Efficient Workplace? . . .

- Employee parked his personal truck in the employee parking lot in front of the Sherriff's office building.
- Employee's truck had a politically offensive bumper sticker – a citizen complained to Sherriff.
- Sherriff asked employee to either cover the bumper sticker while parked in front of the Sherriff's office or to park in the back.



Williams v. McKee, 655 Fed.Appx. 677 (10th Cir. 2016)

- Sheriff's interest in maintaining an efficient workplace and maintaining the appearance of impartiality outweighs employee's First Amendment right to bumper sticker.
- Sheriff's restriction on employee's speech was limited to the workplace.



Efficient Workplace Factor . . .



- Courts also consider whether the critical employee and the criticized employer or official shared the kind of close working relationship for which it can persuasively be claimed that personal loyalty and confidence are necessary.

Efficient Workplace Factor

- Did the employee's speech rely on or purport to present inside information the employee accessed by sole virtue of his government employment?
 - Was this employee qualified to speak with greater authority than any other taxpayer?



Greater Authority Than The Average Taxpayer? . . .

- Internal auditor for a school district found that the budget was inflated – reported her findings to CFO.
- CFO investigated, did not find wrongdoing
- Auditor then reported her findings to school board members.



Holub v. Gdowski, 802 F.3d 1149 (10th Cir. 2015)



- Auditor's report to the school board members fell squarely within the scope of her usual and ordinary responsibilities – her knowledge came by virtue of her employment

Efficient Workplace Factor . . .



- Courts can consider whether the employee's critical statements themselves by asking whether the statements are so without foundation as to call into question the employee's fitness to perform the required duties.
 - "knowing or reckless" statements showing actual malice or falsity may show incompetence.

Did Falsehood Disrupt Employer's Interests? . . .

- Employee worked as an investigator's assistant in the agency charged with regulating the practice of veterinary medicine.
 - Agency investigated a suspected dog fighting ring.
- Employee gossips with her pet's veterinarian about work including that she believed her agency should not be involved.
 - Her veterinarian was a member of legislative group that oversees the agency.



Dixon v. Kirkpatrick, 553 F.3d 1294 (10th Cir. 2009)



- Certainly, the conveyance of false information would interfere with the regular operation of the agency.
- Employee's indiscretion led to an influential member of the professional association regulated by the agency to suspect agency wrongdoing and raise suspicions at a legislative meeting.

Efficient Workplace Factor . . .



- Some positions in public employment have need for confidentiality that is so great that even completely correct public statements might furnish permissible grounds for dismissal.

Protected by Confidentiality? . . .

- Administrative Secretary for local police department instructed to purchase new ballistic vests for all officers except one – a month later, the department terminated that one officer.
- Secretary asked by the terminated officer's attorney to give an affidavit about the vests.



Helget v. City of Hays, Kansas, 844 F.3d 1216 (10th Cir. 2017)

- Loyalty and Confidence are especially important in law enforcement setting.
- Her position required her to handle confidential information – a crucial job requirement – diminution of trust would affect her working relationships and function of department.



Lane v. Franks Factor

- Employee has First Amendment protection from punishment for sworn testimony under subpoena in civil as well as criminal cases.



Was It Protected Sworn Testimony? . . .



- Director of a public youth program performed an audit and discovered that an elected official was on the program's payroll – elected official had never worked for the program.
 - Director terminated elected official's employment
- Federal officials indicted the elected official on separate fraud charges.
 - Director testified, under subpoena at the elected official's trial

Lane v. Franks, 134 S.Ct. 2369 (2014)

- Sworn testimony in judicial proceedings is a quintessential example of citizen speech for the simple reason that anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.



Take Away Lesson . . .



- Fine differences among otherwise similar fact patterns can yield different outcomes.